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FIGHTING BACHA BAZI: PROTECTING THE DANCING BOYS AND IMPLEMENTING THE LEAHY LAWS IN AFGANISTAN

William Badinelli¹

INTRODUCTION

In September 2015, the *New York Times* (the “*Times*”) reported that child sexual abuse committed by Afghan security forces was “rampant”, naming specific Afghan commanders and militia leaders alleged to have committed abuse, as well as U.S. troops who reported the incidents.² Following the *Times*’ report, a bipartisan group of ninety-three members of Congress requested that the Special Inspector for Afghanistan Reconstruction (“SIGAR”) inquire into the United States government’s experience with allegations of child sexual abuse committed by members of the Afghan security forces.³ The members also requested that SIGAR inquire into the manner in which the Leahy laws of the Department of Defense (“DOD” or “Defense Department”) and the U.S. Department of State (“State” or “State Department”) are implemented in Afghanistan.⁴

Under bacha bazi, boys are raped and forced into sexual slavery.⁵ The United States government has been reluctant to confront bacha bazi for fear of isolating Afghan allies in the

¹ J.D. Candidate, 2019, Seton Hall University School of Law, B.A., Binghamton University. This paper is written as course work for National Security and the Rule of Law and fulfills the law school’s Advanced Writing Requirement. Thank you Professor Jonathan Hafetz for the feedback and comments throughout the drafting of this paper.

² Joseph Goldstein, *U.S. Soldiers Told to Ignore Sexual Abuse of Boys by Afghan Allies*, THE NEW YORK TIMES (September 20, 2015), <https://www.nytimes.com/2015/09/21/world/asia/us-soldiers-told-to-ignore-afghan-allies-abuse-of-boys.html>.

³ SIGAR, *Child Sexual Assault in Afghanistan: Implementation of the Leahy Laws and Reports of Sexual Assault by Afghan Security Forces*, App. I, Department of Defense

⁴ *Id.*

⁵ Alice Noman, *The Tragedy of the Dancing Boys in Afghanistan: The US Silence on Bacha Bazi*, 15 SEATTLE J. for SOC. JUST. 501, 504 (2016).

North Atlantic Treaty Organization's ("NATO") fight against the Taliban.⁶ This noninterventionist policy is against the purported values of the United States and undermines its security mission in Afghanistan. Additionally, as the Afghan government is unable to prevent bacha bazi, due to inaction and inability, it falls on the United States to confront and combat the practice. In this paper, I will argue that Afghan security forces that are funded, trained by, and operate alongside the U.S. military are subject to prosecution by the DOD for gross violations of human rights under the Uniform Code of Military Justice ("UCMJ") where there is credible information that the violation occurred. In Part I, I will discuss the history and culture of bacha bazi in Afghanistan, as well as the Afghan government's enabling of the culture. In Part II, I will detail the history of the Leahy laws. In Part III I will argue that the DOD prosecution of Afghan security forces for human rights violations is permissible under U.S. law (the Leahy laws), and how to reconcile the framework of this thesis with the bilateral agreements governing American use of force in Afghanistan. Part III will also briefly touch upon international prosecution and why it is an inappropriate venue. Part IV will recommend the policy proposal of Congress creating a private right to action under the Leahy laws. In sum, this paper will show how the revision and strengthening of the Leahy laws may be utilized to curb bacha bazi.

I. BACHA BAZI AND AFGHANISTAN

a. Bacha Bazi Defined

The term bacha bazi translates into "boy play".⁷ The practice involves bacha baz – "boy players" – men who enslave young boys.⁸ These men are wealthy merchants, government officials,

⁶ Goldstein, *supra* note 2.

⁷ Samuel V. Jones, *Ending Bacha Bazi: Boy Sex Slavery and the Responsibility to Protect Doctrine*, 25 IND. INT'L & COMP. L. REV. 63, 66 (2015)

⁸ *Id.*

or those belonging to militias.⁹ Bacha bazi boys are usually poverty-stricken and without relatives.¹⁰ Sometimes, poor families will sell their sons to a bacha baz, or allow their son to be “adopted”, in exchange for clothing, food, or money.¹¹ Other boys are kidnapped in public places such as the market.¹² Bacha bazi boys are forced to dress as females, wear makeup, and dance for parties of men, where they are sexually exploited.¹³ If they do not please their observers, they can be beaten.¹⁴ The boys are then sold to the highest bidding observer or shared between Afghan men.¹⁵

Bacha bazi inflicts numerous psychological scars on the boys.¹⁶ These boy slaves refer to their masters as “My Lord.”¹⁷ It is rare for victims to attempt escape or report their abusers, due to threat of being killed, their family members being murdered, and the taboo of homosexuality in Afghanistan.¹⁸

b. The Progression of Bacha Bazi

Bacha bazi has become a “shockingly” common practice across Afghanistan’s southern rural areas and northern countryside.¹⁹ The *Mujahideen* warlords who fought off the Soviets invasion in the 1980s regularly engaged in child sexual abuse.²⁰ Keeping boy conscripts around for personal

⁹ Noman, *supra* note 5 at 505.

¹⁰ Jones, *supra* note 7 at 66.

¹¹ *Id.*

¹² *Id.* at 67.

¹³ *Id.*; Ernesto Lodoño, *Afghanistan Sees Rise in ‘Dancing Boys’ Exploitation*, WASH. POST (Apr. 4, 2012), http://www.washingtonpost.com/world/asia_pacific/afghanistans-dancingboys-are-invisible-victims/2012/04/04/gIQAyreSwS_story.html

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Noman, *supra* note 5 at 505.

¹⁹ Chris Mondloch, *Bacha Bazi: An Afghan Tragedy*, FOREIGN POLICY (Oct. 28, 2013), <http://foreignpolicy.com/2013/10/28/bacha-bazi-an-afghan-tragedy/>.

²⁰ *Id.*

service and sexual relations became a status symbol.²¹ Bacha bazi was banned when the Taliban came into power in 1996.²² Enacting strict Sharia law, bacha bazi became taboo, and those who practiced it engaged in secret.²³ Punishments for violation of Islamic law included flagellation, amputation, and execution.²⁴

When the United State military invaded Afghanistan in 2001, it succeeded in toppling the Taliban in coordination with the Northern Alliance, a collection of former *mujahideen* commanders that later returned to power after the Taliban's defeat. In returning to power, the warlords revived the practice of bacha bazi: boys were kidnapped and raped and forced into sexual slavery by empowered predators.²⁵ Afghan families with a bounty of children are eager to provide a child to the regional warlord or official – knowing the sexual consequences – in order to gain wealth or preferential treatment.²⁶

c. Islam and Bacha Bazi

Islam, the official religion of Afghanistan, prohibits homosexuality.²⁷ Despite the prohibition, cultural interpretations of Islamic scripture allows sexual abusers to avoid the penalties.²⁸ A relaxed view of Islam means that that loving a boy would be a sin, whereas simply using the boy for sexual pleasure is something different.²⁹ More specifically, while the act is undesirable, it is

²¹ *Id.*

²² Stephanie Ng, *The Last Taboo: Male Rape and the Effectiveness of Existing Legislation in Afghanistan, Great Britain, and the United States*, 23 TUL. J. INT'L & COMP. L. 227, 229 (2014).

²³ Mondloch, *supra* note 19.

²⁴ Ng, *supra* note 22 at 229.

²⁵ Mondloch, *supra* note 19.

²⁶ *Id.*

²⁷ Ng, *supra* note 22 at 233.

²⁸ U.S. Army, Human Terrain Team, *Pashtun Sexuality*, PUB. INTELLIGENCE, <https://info.publicintelligence.net/HTT-PashtunSexuality.pdf>.

²⁹ *Id.* at 6

far preferential to sex with an ineligible woman, a sin which would likely result in revenge or honor killing.³⁰ Additionally, due to their rural setting and inability to speak Arabic – the language of Islamic texts – Afghans allow social customs to govern over religious values, including the verses of the Quran banning homosexuality.³¹

In sum, the tradition of bacha bazi has become a significant problem throughout Afghanistan following the U.S. invasion in 2001. Both Islam and Afghan cultural interpretation of the Koran have failed to prevent this system of sexual servitude and exploitation. The Afghan government has also failed to confront and prevent perpetrators of bacha bazi.³² Therefore, it has fallen to the U.S. government to confront child sexual abuse committed by Afghan security forces, a task the United States has failed to adequately accomplish.

II. THE LEAHY LAWS

The Leahy laws govern U.S. assistance to foreign military forces; these laws require the Departments of Defense and State to halt funding to troops where there is information of human rights violations. This section explores the background behind Congress' enactment of the Leahy laws, the standard Leahy vetting procedures, and how the U.S. government has failed to implement the laws in regards to funding of Afghan security forces.

a. Background

In 1997, Senator Patrick Leahy of Vermont introduced a bill that limited funding for training in regards to nations with histories of human rights abuses.³³ The legislation arose from Senator

³⁰ *Id.* (these killings are a Pashtun requirement rather than Islamic, though they are linked in the minds of rural Afghan villagers).

³¹ Mondloch, *supra* note 19.

³² See section III(b)(c)(d).

³³ Major Michael J. O'Connor, *Bangladesh Rapid Action Battalion: Satisfying the Requirements of the Leahy Amendments with a Rule of Law Approach*, 215 MIL. L. REV. 182, 186 (2013)

Leahy's, as well as other members' of Congress, concern that recipients of American military funding were using the funding to support oppressive governments in South America.³⁴

The Leahy laws trace their roots back to the School of the Americas ("SOA"), a facility founded by the U.S. Army to enhance partner forces' capabilities through the training of military officers and non-commissioned officers of South American and Central American forces.³⁵ The school had trained over 60,000 students in military tactics such as infantry tactics, foreign internal defense, and international human rights.³⁶ U.S. funding of foreign military troops became an issue after the "Massacre at El Mozote", where Salvadoran troops fired upon the village of El Mozote, killing hundreds of men, women and children.³⁷ Following reports that the massacre involved graduates of the SOA, an advocacy group named SOA Watch formed to track human rights abuses by SOA graduates.³⁸ Senator Leahy's legislation was originally adopted as an amendment to the Foreign Operations Act of 1997, and provides that the State Department has the primary responsibility that Leahy law restrictions are applied to foreign military funding.³⁹

Subsections (a) and (c) of § 2378d of Title 22 of the United States Code state:

- (a) No assistance shall be furnished under this chapter of the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights;
- (c) In the event the funds are withheld from any unit pursuant to this section, the Secretary of state shall promptly inform the foreign government of the basis for such action and shall, to

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 187.

³⁸ *Id.*

³⁹ *Id.* at 188

the maximum extent practicable, assist the foreign government in taking effecting measures to bring the responsible members of the security forces to justice.⁴⁰

DOD's corresponding Leahy law is specified in section 362 of Title 10 of the United States Code. DOD is prohibited from using any funds for "any training, equipment, or other assistance for a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights."⁴¹ The law requires the Defense Secretary, in consultation with the Secretary of State, to "ensure that prior to a decision to provide any training, equipment, or other assistance to a unit of a foreign security force full consideration is given to any credible information available to the Department of State relating to human rights violations by such unit."⁴² Prior to 2014, the DOD Leahy law appeared as a provision in the annual DOD appropriation.⁴³ This earlier version prohibited DOD from using funds to support any training program involving a unit of the security forces or police of a foreign country if the Defense Secretary has received credible information from the State Department that the unit has committed a gross violation of human rights.⁴⁴ The change of language in 2014 expanded the DOD Leahy law prohibition from applying only training programs to applying to any kind of DOD assistance for foreign security forces.

Despite the DOD and State language, neither departments' Leahy law define "gross violation of human rights" or "credible information". According to DOD and State guidance, the departments rely upon the definition of "gross violation of human rights" as defined in §

⁴⁰ 22 U.S.C. § 2378(a)(c).

⁴¹ 10 U.S.C. 362(a)(1)

⁴² 10 U.S.C. 362(a)(2)

⁴³ SIGAR, *supra* note 3 at 2 n. 5; *see e.g. Consol. and Further Continuing Appropriations Act*, 2013, Pub. L. No. 113-6, Div. C, § 8057.

⁴⁴ *Id.*

502B(d)(1) of the Foreign Assistance Act of 1961.⁴⁵ According to the Foreign Assistance Act, the term “gross violations of internationally recognized human rights” includes, “torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of the person”.⁴⁶ Both DOD and State view sexual assault of children as a gross violation of human rights.⁴⁷

b. Leahy Laws Vetting Procedures

DOD and State typically follow a standard vetting process. The process begins with the State’s Bureau of Democracy, Human Rights, and Labor (“DRL”) vets all candidates for assistance through its International Vetting and Security Tracking (“INVEST”) system to determine whether there is credible information of a gross violation of human rights before providing funding.⁴⁸ A Leahy vetting request is approved if no derogatory information is found on either the unit or the individual during the search.⁴⁹ A request is canceled for administrative reasons unrelated to derogatory information; a request is suspended if the preliminary vetting search identifies possible derogatory information; a request is rejected if confirmed derogatory information is found.⁵⁰

In July 2014, DOD and State established separate procedures unique to Afghanistan.⁵¹ For new recruits, initial vetting is done by the Afghan authorities using their own vetting process; in the absence of a specific request for assistance, DOD and State do not vet every member of a unit

⁴⁵ SIGAR, *supra* note 3 at 4.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 5.

⁴⁹ *Id.* at 5 n. 16.

⁵⁰ *Id.*

⁵¹ *Id.* at 6.

receiving assistance.⁵² The U.S. will vet under two circumstances: (1) when individual Afghans are to receive training in the U.S., and; (2) when a gross violation of human rights is reported and DOD and State attempt to identify the units and troops responsible.⁵³

c. U.S. Implementation of the Leahy Laws in Afghanistan is Ineffective.

The U.S. government has taken on a policy of inaction and ignorance over human rights violations committed by Afghan security forces funded by DOD and State. As of September 2016, DRL had conducted 18,768 Leahy vetting requests for Afghan security forces since 2010; this includes 5,753 requests from DOD, and of those, 4,818 were approved, 284 were canceled, 651 suspended, and none rejected.⁵⁴ From 2010 to 2016, the U.S. military asked to review Afghan military units to see if there were any instances of gross violations of human rights abuse on 5,753 occasions; not once was funding cut off.⁵⁵ U.S. funding of Afghan security forces continue unabated, despite the fact that as of August 2016, DOD was tracking seventy-five reported human rights violations, seven of which involved child sexual assault.⁵⁶ In addition to the reported child sexual assaults, DOD and State have determined that there was credible information of gross violation of human rights for twenty-three of forty-six incidents not involving child abuse, such as extrajudicial killings and torture.⁵⁷ In many of these cases, DOD has used what is called the

⁵² *Id.* (as many members of the Afghan security forces do not have birth certificates and some names are common, State does not have baseline information on many Afghan security force members; it would be a waste to enter all new recruits into INVEST).

⁵³ *Id.*

⁵⁴ *Id.* at 5.

⁵⁵ Rod Norland, *Afghan Pedophiles Get Free Pass from U.S. Military, Report Says*, THE NEW YORK TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/world/asia/afghanistan-military-abuse.html>.

⁵⁶ SIGAR, *supra* note 3 at 13.

⁵⁷ *Id.* at 14.

“notwithstanding clause” of the Defense Appropriations Act to continue to funding Afghan security forces which have been implicated in gross violations of human rights.⁵⁸

Since the Afghanistan Security Forces Fund (the “ASFF”) was established in 2005, Congress has made appropriations to the ASFF subject to the requirement that funds “shall be available to the Secretary of Defense, notwithstanding any other provision of law”.⁵⁹ This notwithstanding clause has allowed the U.S. government to circumvent the Leahy laws and continue funding for training, equipment, and other assistance, to units confirmed to have committed gross violations of human rights.⁶⁰ Additionally, the commander of U.S. forces in Afghanistan is authorized to petition for expanded application of the notwithstanding clause for Afghan security forces implicated in human rights violations.⁶¹ The notwithstanding clause allows the U.S. government to continue funding sexual predators and human rights violators, undermining our nation’s commitment to human rights and liberties. The SIGAR report recommends that DOD stop using the notwithstanding clause to avoid Leahy law implementation, and, in a positive step, a U.S. Senate draft defense appropriation bill in the Senate backs SIGAR’s recommendation.⁶²

III. ANALYSIS

Bacha bazi boys are raped and forced into sexual slavery by older, powerful Afghan men, such as warlords and government officials.⁶³ Both DOD and State view child sexual assault as a “gross violation of human rights” as defined under the Foreign Assistance Act’s defined use of the term.

⁵⁸ Norland, *supra* note 55.

⁵⁹ SIGAR, *supra* note 3 at 3; *see* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231, 235-36; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2385-86 (2016).

⁶⁰ *Id.* at 15.

⁶¹ *Id.* at 16.

⁶² Norland, *supra* note 55.

⁶³ Jones, *supra* note 7 at 66.

Therefore, the Leahy laws govern Afghan security forces engaged in bacha bazi. The DOD Leahy law must be enhanced in order to punish sexual predators and bring an end to bacha bazi. Specifically language should be added to § 362 that mirrors the language of State's Leahy law § 2378d(c). Under this new framework, the clause § 362(a)(3) would state:

(3) In the event that funds are withheld from any unit pursuant to this section, the Secretary of Defense shall promptly inform the foreign government of the basis for such action and shall, to the maximum extent practicable, assist the foreign government in taking effecting measures to bring the responsible members of the security forces to justice.

Under this “maximum extent practicable” clause, DOD can investigate and prosecute Afghan security forces for gross violations of human rights when the Afghan government is unable to do so. Specifically, Afghan security forces that are funded, trained by, and operate alongside the U.S. military are subject to DOD prosecution for gross violations of human rights under the UCMJ where there is credible information that such violation occurred.

a. The UCMJ may be applied to Afghan security forces funded, trained by, and operating Alongside U.S. Forces.

Afghan security forces receiving assistance from the U.S. government can be subjected to U.S. military prosecution for gross violations of human rights. Article 2(a)(11) of the UCMJ states that subject to the provisions of any treaty or agreement to which the U.S. is party to, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States are subject to the code.⁶⁴ Typically, the UCMJ has no authority over civilians.⁶⁵ In *Reid*, two murder cases were consolidated to determine the issue of whether

⁶⁴ 10 U.S.C. § 802, Art. 2(a)(11).

⁶⁵ *Reid v. Covert*, 354 U.S. 1, 5 (1957).

dependents of servicemembers could be subjected to military prosecution.⁶⁶ Two military spouses were tried and convicted of murdering their husbands on foreign military bases; these bases were in Great Britain and Japan, respectively.⁶⁷ Despite treaties with both countries allowing military prosecution of servicemembers' dependents, the Court ruled that dependents do not lose their civilian status and constitutional protections afforded to that status, and are therefore exempted from military prosecution.⁶⁸

Reid also articulated circumstances where civilians can be subjected to military jurisdiction. Civilians may be subjected to the UCMJ under the Executive's war powers, where, in the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefield.⁶⁹ This policy stems from the pre-Constitution notion that extraordinary circumstances present in an area of actual fighting have been considered sufficient to permit some punishment of civilians in that area by military courts under military rules.⁷⁰ This policy has been extended to civilians more recently, when Congress placed private contractors – who accompany U.S. forces into the field – under UCMJ jurisdiction, extending UCMJ jurisdiction over civilians not just in times of declared war but contingency operations as well.⁷¹

Afghan security forces receiving funded, trained by, and operating alongside U.S. forces are subject to prosecution under the UCMJ. In contrast the peacetime Britain and Japan (in *Reid*), the United States is involved in a declared war in Afghanistan, where there is actual fighting and

⁶⁶ *Id.*

⁶⁷ *Id.* at 3-5.

⁶⁸ *Id.* at 33.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Peter Singer, *Frequently Asked Questions on the UCMJ Change and its Applicability to Private Military Contractors*, BROOKINGS (Jan. 12, 2007), <https://www.brookings.edu/opinions/frequently-asked-questions-on-the-ucmj-change-and-its-applicability-to-private-military-contractors/>.

the U.S. and its allies are engaging an actively hostile enemy in the Taliban. The extraordinary circumstances outlined in *Reid* are present in the Afghanistan War – where private military contractors are already subjected to UCMJ purview. Afghanistan’s government is unable to prosecute bacha baz for the following reasons: the judicial system’s lack of expertise and experience in the subject of rape; the legal system’s inability to reach the entire country, and; the Afghan government’s complicity in the custom. Under these circumstances, Afghan troops operating alongside U.S. forces can be subjected to UCMJ prosecution for gross violations of human rights.

b. Afghanistan’s legal system is inadequately prepared to confront Bacha Bazi.

Afghanistan’s justice system is inadequate to investigate and prosecute child sexual abuse cases such as bacha bazi. Prior to January 2017, Afghanistan’s anti-trafficking and smuggling laws were governed by the country’s 1976 penal code.⁷² The 1976 penal code did not explicitly criminalize rape, only referencing adultery and pederasty.⁷³ Additionally, there was no discussion of consent in the 1976 penal code.⁷⁴ In January 2017, bacha bazi was explicitly prohibited for the first time in the updated anti-trafficking and smuggling law.⁷⁵ The new penal code is a step in the right direction: in an entire chapter penalizing bach bazi, perpetrators can face seven years in jail while those who keep multiple boys younger than twelve years old can face life imprisonment.⁷⁶ More important to this paper, chapter five of the new penal code details that Afghan national

⁷² Jared Ferrie, *Human Trafficking on the Rise in Afghanistan Despite New Laws*, REUTERS (Mar. 29, 2018), <https://www.reuters.com/article/us-afghanistan-humantrafficking-laws/human-trafficking-on-the-rise-in-afghanistan-despite-new-laws-idUSKBN1H52U8>.

⁷³ Ng, *supra* note 22 at 230.

⁷⁴ *Id.*

⁷⁵ Ferrie, *supra* note 72.

⁷⁶ Sayed Jalal Shajjan, *The Revised Criminal Code: an End for Bacha Bazi?*, LSE, <http://blogs.lse.ac.uk/southasia/2018/01/24/the-revised-afghanistan-criminal-code-an-end-for-bacha-bazi/>.

security forces involved in bacha bazi face imprisonment of up to fifteen years.⁷⁷ Enforcement of the penal code went into effect in January 2018.⁷⁸ Despite the strengthening of the law, resources to enforce it are not available.⁷⁹ Afghanistan does not have a court dedicated to hearing human trafficking cases and there is little public education about trafficking and where victims should report it.⁸⁰ There appears to be a lack of knowledge about rape in general: a survey of convicted rapists in the Herat prison indicated that most were unaware that rape was a criminal offense and that they would be imprisoned for it.⁸¹

The U.S. military judicial system is well-equipped to handle cases involving bacha bazi and prosecute Afghan security forces engaged in the practice. In contrast to the Afghan penal code, the UCMJ has been around for over 200 years, governing the conduct of U.S. servicemembers.⁸² The UCMJ has well-defined and outlined trial procedures to its court-martial.⁸³ Competent and experienced military judges will hear the case of an Afghan security soldier, and it is likely that a Judge Advocate experienced in sexual crimes will be appointed as defendant's counsel. The UCMJ is far better qualified to deal with bacha bazi in the courtroom.

c. The Afghan legal system is not present throughout the country.

There is also an issue of the justice system's reach across the country. At present, it is likely that Afghanistan's legal system is unable to operate throughout the country, hampering the government's ability to prosecute human rights abuses by security forces in the rural and tribal

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Ferrie, *supra* note 72.

⁸⁰ *Id.*

⁸¹ U.N. Off. High Comm'r for Hum. Rts., *Silence is Violence: End the Abuse of Women in Afghanistan*, July 8, 2009, https://unama.unmissions.org/sites/default/files/vaw-english_1.pdf.

⁸² *History*, <http://www.ucmj.us/history-of-the-ucm>.

⁸³ *Id.*

areas of Afghanistan. As of August 2017, thirteen percent of Afghanistan's districts are under Taliban control or influence.⁸⁴ Furthermore, a recent BBC study indicates that the Taliban are openly active in seventy percent of the country, with the Afghan government only controlling 112 districts – thirty percent of the country.⁸⁵ One of the major weaknesses in the Afghan system for addressing gross violations of human rights is that the ministries responsible for prosecuting them lack the capability to conduct sophisticated investigations and investigate cases that happened in the past.⁸⁶ This is especially troubling because human rights violation cases often come from the remote and rural areas, where there are weak government institutions make investigation and prosecution more difficult.⁸⁷

Here, the U.S. military's legal system is better equipped as well. Throughout U.S. involvement in Afghanistan, military investigators have been deployed to Afghanistan to assist in the war effort. For example, the U.S. Army's Criminal Investigation Command ("CID") has been deployed to recover stolen U.S. property from Afghan storefronts⁸⁸ and investigate suicide bombings.⁸⁹ U.S. military investigators are likely able to conduct sophisticated investigations in rural areas as well. The DOD Leahy language proposal does not allow the U.S. military to

⁸⁴ Idrees Ali, *Taliban Increases Influence, Territory in Afghanistan: U.S. Watchdog*, REUTERS (Oct. 31, 2017), <https://www.reuters.com/article/us-usa-afghanistan-militants/taliban-increases-influence-territory-in-afghanistan-u-s-watchdog-idUSKBN1D026N>.

⁸⁵ Reuters Staff, *Taliban Active in 70 percent of Afghanistan, BBC Study Finds*, Jan. 30, 2018, <https://www.reuters.com/article/us-afghanistan-taliban-study/taliban-active-in-70-percent-of-afghanistan-bbc-study-finds-idUSKBN1FK03C>.

⁸⁶ SIGAR, *supra* note 3 at 22.

⁸⁷ *Id.* at 23.

⁸⁸ Colby Hauser, *CID Special Agents Put Taliban on Notice*, U.S. Army CID (Aug. 9, 2011), <http://www.cid.army.mil/assets/docs/press-releases/CID%20Special%20Agents%20%20Puts%20Taliban%20On%20Notice.pdf>.

⁸⁹ Colby Hauser, *Special Agent Embraces Unconventional Assignment*, U.S. Army CID (Aug. 12, 2011), <http://www.cid.army.mil/assets/docs/press-releases/Special%20Agent%20Embraces%20Unconventional%20Assignment.pdf>.

prosecute Afghan security forces for gross violations of human rights in situations where the Afghan government is able to.⁹⁰

d. The Afghan government is complicit in Bacha Bazi.

The Afghan government cannot be relied upon to confront bacha bazi due to its complicity in the practice. The Afghan government has been known to prosecute the victims of bacha bazi as opposed to the abusers, while government officials exploit the boys sexually.⁹¹ Additionally, Afghan security forces are among the largest number of sexual predators.⁹² As proof of this assertion, Jones, in his paper, offers as evidence a Frontline documentary, *The Dancing Boys of Afghanistan*, in which appears video of Afghan police officers fondling young boys.⁹³ Bacha bazi is so pervasive among Afghan police that the Taliban is using child sex slaves to mount insider attacks in southern Afghanistan.⁹⁴ Essentially the Taliban are using bacha bazi boys as Trojan horses to attract police officers.⁹⁵ In one such attack, a checkpoint commander and six other officers were gunned down by the commander's sex slave.⁹⁶ Bacha bazi is so common in Afghanistan that there are estimates that fifty percent of the men in the Pashtun tribal areas of Afghanistan take on boy lovers.⁹⁷ The Afghan government has recently started pursuing criminal cases against those involved in bacha bazi, however, the majority of cases are dropped due to

⁹⁰ The Afghan government controls the city of Kabul and the judicial system there is open and functioning – it is unlikely the U.S. can prosecute Afghan security forces where the crime occurred in Kabul.

⁹¹ Jones, *supra* note 7 at 71.

⁹² *Id.*

⁹³ *Id.* at 72.

⁹⁴ Anuj Chopra, *Taliban use 'honey trap' boys to kill Afghan police*, YAHOO (Jun. 16, 2016), <https://www.yahoo.com/news/taliban-honey-trap-boys-kill-afghan-police-034032649.html>

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Mondloch, *supra* note 19.

perpetrators paying bribes or having relationships with law enforcement officials.⁹⁸ Furthermore, DOD readily admits that the full extent of child sexual assault and other violations of human rights happening in Afghanistan may never truly be known.⁹⁹ Twenty-four of the thirty-seven individuals and organizations – current and former servicemembers, contractors, NGOs, journalists – interviewed by SIGAR admitted they knew of bacha bazi and child sexual assault.¹⁰⁰ According to an NGO representative, “Bacha bazi is very sensitive, and those involved are in high positions within the Afghan military, which makes going after these individuals very difficult”.¹⁰¹

The Afghan government is complicit in bacha bazi and has proven it is not a fair arbiter of justice unable to victims child sexual abuse. While the United States has turned a blind eye toward human rights violations committed by its partner forces – *see* discussion in Section IV(b) – it has not contributed to the plague of child sexual abuse the way that the Afghan government, and its officials, have done. Allowing abusers to remain in positions of power sends a message that the safety of children is not an imperative concern of the Afghan government. In dismissing charges against sexual abusers, the judicial system displays its corruption and dismissal of the victims. By prosecuting perpetrators under the UCMJ, victims are ensured that claims of abuse will be investigated thoroughly, prosecuted nobly, and heard fairly.

e. The proposed language for 362(a)(3) conflicts with United States legal authority to intervene in Afghanistan and the use of force permitted by current bilateral agreements.

⁹⁸ Amitai Etzioni, *America's Enduring Bacha Bazi Problem in Afghanistan*, THE NAT'L INTEREST (Dec. 7, 2017), <http://nationalinterest.org/feature/americas-enduring-bacha-bazi-problem-afghanistan-23557>.

⁹⁹ SIGAR, *supra* note 3 at 18.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 19.

This paper's proposed policy under an updated DOD Leahy law is inconsistent with the United States legal authority to intervene in Afghanistan and the U.S. military's use of force abilities. In 2003, NATO assumed control of International Security Assistance Force ("ISAF") operations in the country.¹⁰² ISAF personnel operated under the 2002 Military Technical Agreement ("MTA") between the ISAF and the Interim Administration of Afghanistan.¹⁰³ U.S. forces operated under a 2003 diplomatic agreement between the U.S. and the interim administration.¹⁰⁴ The MTA provided that the interim Afghan government had responsibility for the security and law and order.¹⁰⁵ In 2014, the Afghan government entered into a Security and Defense Cooperation Agreement ("SDCA") with the U.S., as well as a Status of Forces Agreement ("SOFA") with NATO.¹⁰⁶ Both the SDCA and SOFA provide that Afghan law enforcement personnel enforce Afghan law and order.¹⁰⁷ These two agreements additionally prohibit U.S. forces from arresting or imprisoning Afghans and bar operation of detention facility in Afghanistan.¹⁰⁸ U.S. forces are allowed to, however, detain Afghans for delivery over to Afghan authorities in connection with a crime under Afghan law.¹⁰⁹

Despite the above-described limitations, the U.S. military can still intervene in cases of bacha bazi and child sexual abuse. U.S. servicemembers in Afghanistan are governed by the law of war, a body of law based on international law and treaties which DOD assets must comply with

¹⁰² Inspector General, DOD, *Implementation of the DOD Leahy Law Regarding Allegations of Child Sexual Abuse by Members of the Afghan National Defense and Security Forces*, 39, DOD (Nov. 16, 2017), https://media.defense.gov/2017/Nov/15/2001843802/-1/-1/1/DODIG-2018-018_CHILD_SEXUAL_ABUSE_V2_508_R_REDACTED.PDF.

¹⁰³ *Id.* at 39-40.

¹⁰⁴ *Id.* at 40.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 40-41.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

during armed conflict.¹¹⁰ As part of the law of war, the Geneva Convention and its Additional Protocols bar sexual assault against civilians.¹¹¹ Afghanistan is a member to the Geneva Convention and its Additional Protocols, as well as a member to the U.N. Convention on the Rights of the Child.¹¹² Afghan security forces therefore have a duty to protect children from sexual abuse and violence, and should Afghan security forces engage in child abuse, would be committing a crime of both Afghan and international law.¹¹³ Under these frameworks, U.S. troops may intervene and use reasonable force necessary to prevent the observed sexual assault committed against a child by a member of the Afghan security forces.¹¹⁴

The bilateral agreements covering U.S. authority in Afghanistan do not sufficiently protect victims of bacha bazi. It is clear under the terms of the agreements that U.S. arrest, detention, and prosecution of Afghan security forces for gross violations of human rights is prohibited, conflicts with this paper's alteration and interpretation of the DOD Leahy law. As such, I recommend that the U.S. alter its bilateral agreements with the government of Afghanistan to allow U.S. prosecution of Afghan security forces under the UCMJ where there is credible information that the unit committed gross violations of human rights. These prosecutions should be restricted to situations where the Afghan government is unable to investigate and prosecute claims of child sexual abuse due to the reasons specified in Section III(a)(b)(c). This proposed change in language to SDCA and SOFA would likely experience significant backlash from the Afghan government, as well as reluctance from the U.S. to alter significant language in bilateral agreements where U.S.

¹¹⁰ *Id.* at 42.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

servicemembers enjoy immunity from criminal jurisdiction of the host country.¹¹⁵ While these issues are noted, the risks and consequences of altering the U.S.-Afghanistan bilateral agreements are beyond the scope of this paper. The proposed language reflects the best approach towards confronting bacha bazi and protecting its victims.

f. The International Criminal Court is an inappropriate venue for prosecution of Afghan security forces for Bacha Bazi.

The International Criminal Court (“ICC”) is the inappropriate venue for prosecuting Afghan security forces for child sexual abuse. In November 2017, the ICC’s prosecutor requested the court’s permission to authorize an investigation into possible war crimes and crimes against humanity in Afghanistan since 2003.¹¹⁶ The ICC prosecutor wants to investigate crimes committed by Afghan government forces, but by the U.S. military and Central Intelligence Agency.¹¹⁷ The ICC relies on its member states to cooperate with investigations, including with access to witnesses and crime scenes, and assisting in arrests.¹¹⁸ Afghanistan is a member state and will be relied upon should an investigation be approved.¹¹⁹ Additionally, while the U.S. is not a member country, the ICC would still have jurisdiction over war crimes and crimes against humanity committed in Afghanistan by nationals of non-party states due to Afghanistan’s member status.¹²⁰

The United States is opposed to ICC involvement in Afghanistan; DOD does not accept that ICC investigation of U.S. personnel is warranted, and the State Department opposes the court’s

¹¹⁵ *Id.* at 40.

¹¹⁶ Human Rights Watch, *Afghanistan and the International Criminal Court*, HUMAN RIGHTS WATCH (Nov. 20, 2017), <https://www.hrw.org/news/2017/11/20/afghanistan-and-international-criminal-court>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

involvement in country.¹²¹ The U.S. is not member to the ICC due to its fear of U.S. personnel being subjected to prosecution for political purposes.¹²² The conflict between the ICC and the U.S. would be an unwelcome development in the fight against bacha bazi. The U.S. would likely pressure the Afghan government and its NATO allies to reject an ICC investigation, and refuse participation in such investigation should it be warranted. ICC investigation could also lead to a drawdown of U.S. troops in Afghanistan, reducing the already limited visibility into the rural and contested areas of the country, further preventing reporting of child sexual abuse. ICC prosecution of Afghan security forces is inappropriate so long as a proposed investigation will also investigate U.S. military forces.

In conclusion, for the reasons outlines above, the Leahy laws should be amended to allow the U.S. military to prosecute Afghan security forces under the UCMJ for gross violations of human rights.

IV. CONGRESS MUST ENACT STATUTORY AUTHORITY FOR A PRIVATE RIGHT TO ACTION UNDER THE LEAHY LAWS

To strengthen the enforcement of the Leahy laws, Congress must enact statutory language authorizing private right to challenge State and DOD funding of Afghan security forces alleged to have committed gross violations of human rights, and where there is credible information the violations have occurred. At present, there is no judicial remedy to non-enforcement of the Leahy laws.¹²³ In absence of judicial review, bacha bazi victims are left at the mercy of a corrupt legal

¹²¹ AP, *Millions of Afghans tell Court they're War Crimes Victims*, CBS NEWS (Feb. 16, 2018), <https://www.cbsnews.com/news/afghanistan-war-crimes-international-criminal-court-taliban-isis-afghans-us/>.

¹²² *Id.*

¹²³ Nathanael Tenorio-Miller, *The Leahy Law: Congressional Failure, Executive Overreach, and the Consequences*, 45 CORNELL INT'L L.J. 667, 692 (2012)

system and U.S. agencies that are continuing to fund Afghan units committing human rights abuse. This section argues that a private right to action under the Leahy laws will provide bacha bazi victims an avenue to halt funding to abusers.

a. The judiciary cannot currently review challenges to implementation of the Leahy laws.

The judiciary cannot review challenges to Leahy law implementation due to the judiciary's deference to the Executive branch in matter of national security and defense. The Supreme Court has previously ruled that unless Congress has provided otherwise, the Court is reluctant to decide on Executive authority in military and national security affairs.¹²⁴ In *Egan*, the respondent was a laborer at a Tident Naval Refit Facility; the job that required a security clearance.¹²⁵ Respondent was later removed from his position for failure to receive a security clearance, and challenged the removal under the Merit Systems Protection Board.¹²⁶ The Court overturned the lower court's decision, holding that the protection board did not have authority to review the security clearance decision-making process.¹²⁷ The Court's decision rested on its opinion that it is the authority of the Executive branch to determine which information to classify and who may access such information.¹²⁸ The Court further reemphasized its view that foreign policy is the "province" of the Executive, and that courts typically defer to Presidential responsibilities in that arena.¹²⁹

¹²⁴ *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

¹²⁵ *Id.* at 520.

¹²⁶ *Id.* at 522.

¹²⁷ *Id.* at 529.

¹²⁸ *Id.* at 527.

¹²⁹ *Id.* at 529-30.

The Court has extended its deference to the Executive branch to implementation of the Leahy laws its history.¹³⁰ Presently, *Abusharar* is the only attempt at judicial enforcement of the Leahy laws.¹³¹ In *Abusharar*, the plaintiff, a Palestinian-American lawyer, alleged that he owned a home in the Gaza Strip which was destroyed in a bombing conducted by the Israeli military.¹³² Abusharar additionally asserted that the U.S. government provided the weapons for the bombing, and that his brother was killed by the Israeli Army.¹³³ Alleging that Israel had committed gross violations of human rights, Abusharar sued to enjoin the U.S. from providing assistance to Israel under the framework the State Leahy law.¹³⁴ The court granted the U.S. government's motion to dismiss, concluding that assistance under the Leahy amendment is a political question not included in the district court's jurisdiction.¹³⁵ Abusharar was essentially asking the court to render its own judgment on a "sensitive area of foreign policy".¹³⁶ Furthermore, the court found that because the Leahy law contained no private right of action, plaintiff lacked standing to bring the claim.¹³⁷

A congressional statute allowing a private right to action under the Leahy laws would strengthen the laws' enforcement powers. As discussed, the avenue of relief for bacha bazi victims leads to Congress, not the courts. Should Congress grant a private action, Afghan sexual abuse victims will be able to sue the U.S. over the failure to cut off funding from human rights violators. Judicial scrutiny will put pressure on DOD and State to comply with the Leahy laws, and the stop of funding to abusers will weaken their power over the community. A private right of action to

¹³⁰ Jess Hunter-Bowman, *To the People: Enhancing the Leahy Law Human Rights Enforcement Through a Private Cause of Action*, 51 VAL. U.L. REV. 831, 873 n. 146 (2017).

¹³¹ *Id.*

¹³² *Abusharar v. Hagel*, 77 F.Supp.3d 1005, 1006 (C.D. Cal. 2014).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

challenge U.S. foreign assistance may subject all U.S. foreign funding decisions to challenge; while this is not the intended result of my proposal, I do recognize the possibility. Such impediment to the Executive should not deter Congress from creating this private right; the judiciary decides each case on its merits.

b. Additional Policy Considerations for a Private Right to Action

A private right to action under the Leahy laws provides victims a path to recourse. Throughout U.S. involvement in Afghanistan, the U.S. has adopted a policy of ignorance and inaction to human rights violations committed by Afghan partner forces. While SIGAR reports that it found no evidence U.S. forces were told to ignore human rights¹³⁸, published articles report different.¹³⁹ The *Times* has reported that American soldiers and Marines have been instructed not to intervene – even in situations where Afghan allies have abused boys on military bases.¹⁴⁰ The policy of non-intervention is intended to maintain relations with security units trained to fight the Taliban, as well as U.S. reluctance to impose cultural values where bacha bazi is “rampant”.¹⁴¹ Worse, the U.S. military has taken to reprisals against servicemembers who intervene against known abusers in the Afghan security forces.¹⁴² Dan Quinn, a former Army Special Forces officer, was relieved of command for beating up Abdul Rahman, a U.S. backed militia commander who kept a boy chained to his bed as a sex slave, then beat the boy’s mother for notifying authorities.¹⁴³ Sergeant First Class Charles Martland, who joined Quinn in beating up the commander, was subjected to the Army’s attempt to forcibly retire him for them service.¹⁴⁴ Sgt. Martland was able

¹³⁸ SIGAR, *supra* note 3 at 10.

¹³⁹ Goldstein, *supra* note 2.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

to stay in the Army due to the high-profile backlash against his forced retirement, which included the involvement of Congressman Duncan Hunter and the Veterans of Foreign Wars.¹⁴⁵ In addition, Marine Major Jason Brezler is under investigation for unlawful transmission of classified material.¹⁴⁶ Brezler's alleged transmission centers around his email – to Marine officers at Forward Operating Base Delhi – regarding Sarwan Jan, an Afghan police commander.¹⁴⁷ Jan was previously arrested for corruption, Taliban support, and child abduction.¹⁴⁸ Jan made his way back onto a U.S. base with a group of “tea boys”, one of whom killed three Marines on base in 2012.¹⁴⁹ DOD has disputed some of the *Times* article's allegations, however, an examination of DOD's policy toward human rights reporting violations is just as abysmal.

According to SIGAR, DOD did not have any guidance specifically requiring the reporting of human rights violations in Afghanistan until November 2011, ten years after the U.S. invasion.¹⁵⁰ DOD only adopted explicit guidance on reporting gross violations of human rights after Congress amended the Leahy law in 2014.¹⁵¹ Additionally, State does not have specific guidance and training on reporting incidents involving the sexual abuse of children.¹⁵² DOD officials do not believe that all child sexual report incidents reflect the extent of the practice in Afghanistan; the absence of explicit guidance and training from DOD on reporting child sexual abuse before 2015 may have confused servicemembers on what to do on becoming aware of an

¹⁴⁵ Kyle Jahner, *Green Beret Who Beat Up Accused Child Rapist Can Stay in the Army*, ARMY TIMES (Apr. 28, 2016), <https://www.armytimes.com/news/your-army/2016/04/29/green-beret-who-beat-up-accused-child-rapist-can-stay-in-army/>.

¹⁴⁶ Goldstein, *supra* note 2.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ SIGAR, *supra* note 3 at 8.

¹⁵¹ *Id.* at 11.

¹⁵² *Id.* at 12.

incident.¹⁵³ Lastly, due to the drawdown of U.S. forces in the country, DOD and State rely on Afghan reports on human rights violations.¹⁵⁴

A private action under the Leahy laws is necessary due to the failures of the U.S. government to protect bacha bazi victims. U.S. servicemembers who intervene face retribution, despite authority under the law of war to do so. Despite instances where there is credible information of gross violations of human rights, DOD has used the “notwithstanding clause” of the Defense Appropriations Act to continue funding of violators. DOD’s long-time absence of guidance on child sexual abuse reporting hinders identification of abusers and allows security forces to engage in bacha bazi with impunity. While self-reporting is typically a positive, Afghan self-reporting must be viewed skeptically. Security forces engaged in human rights violations cannot be trusted to police themselves. As such, bacha bazi victims cannot rely on the discretion of the U.S. executive, or the policing of Afghan security forces. A private right to action will accomplish two goals: (1) allows victims to enjoin funding from forces which use it for the sexual exploitation of Afghan boys, and; (2) force U.S. executive agencies to uphold the human rights laws Congress has enacted.

V. CONCLUSION

Bacha bazi boys are raped and forced into sexual slavery; the practice is widespread and part of the culture of Afghanistan. The United States government has adhered to a non-interventionist policy for too long, overlooking child sexual abuse committed by Afghan partner forces. The Afghan government has proven itself unable and unwilling to combat bacha bazi and bring sexual predators to justice. As such, it is the obligation of the United States to prosecute

¹⁵³ *Id.* at 18-19.

¹⁵⁴ *Id.* at 20.

Afghan security forces for gross violations of human rights where there is credible information that violations have occurred. U.S. forces are intertwined with their partner forces in Afghanistan. These Afghan security forces train and operate alongside the American military; they share the same bases and receive funding from the U.S. government. As such, these partner forces become representative of the United States, and the ideals our country stands for. We cannot allow troops receiving military funding and assistance to participate in bacha bazi and stain the human rights America champions. Afghan troops funded, trained by, and operating alongside U.S. forces are subject to U.S. military prosecution under the UCMJ, subject to the proposed language of 362(a)(3) of the DOD Leahy law. Further, enacting a private right to action to enforce the Leahy laws will strengthen enforcement of human rights law, cut funding from human rights violators, and provide bacha bazi victims a path to redress. The U.S. has invested heavily in securing Afghanistan a brighter future; we are obliged to strive towards ending bacha bazi.